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No. 91-217

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IN THE

Supreme Court of the United States

October Term, 1991

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES AND PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT

KALISPEL INDIAN TRIBE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the federal courts below reasonably construe Washington State law in locating the ordinary high water line of the Pend Oreille River along riparian lands of the Kalispel Indian Reservation?

2. Did the federal courts reasonably decide to rely on the Washington State Supreme Court's definition of ordinary high water line in Austin v. City of Bellingham rather than await petitioners' attempt to relitigate the definition in a related state court case?

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STATEMENT OF THE CASE

The Joint Petition mischaracterizes the federal court rulings and omits significant facts. Both the court of appeals and federal district court interpreted Washington case law as defining ordinary high water to exclude lands useable for grazing or other agricultural pursuits from riverbed. They arrived at this conclusion after analyzing the Washington State Supreme Court's opinion in Austin v. City of Bellingham, 69 Wash. 677, 126 P. 59 (1912), which sets forth criteria to be used in locating an ordinary high water line. The court of appeals found these criteria no different than those used in federal common law. U.S. v. Pend Oreille Public Utility District No. 1, 926 F.2d 1502, 1505 (9th Cir. 1991), Appendix To Joint Petition For Writ of Certiorari (hereafter, "J.A.")

28a-32a, 171a-173a. It did not hold that federal law was controlling but explicitly stated it was unnecessary to decide which law controlled, since the Washington Supreme Court had defined ordinary high water in the same way as the federal courts. 926 F.2d at 1506, J.A. 28a.

The court of appeals concluded that "[t]he determinative factual issue ... was whether, prior to construction of the [petitioner PUD's Box Canyon] dam, the lands between the elevations of 2028 and 2041 feet, though subject to seasonal flooding, were nonetheless useful for agricultural or grazing purposes..." 926 F.2d at 1506, J.A. 33a. The appeals court determined that the district court's findings on this issue were well supported by the record. Id.

With "no doubt in the Court's mind," the federal district court had found that,

prior to construction and operation of the Box Canyon Dam in 1955, Kalispel tribal members grazed and pastured their livestock along the Pend Oreille River, down to the 2028 foot elevation line. J.A. 172a. There also was evidence of hay harvesting at this level and gathering of wild carrots and onions. 926 F.2d at 1506, J.A. 33a. In referencing the PUD flowage easements, petitioners failed to mention the express provisions which prohibit exceeding the 2028 elevation "[d]uring haying season". J.A. 167a-169a. The flowage easements were considered by the district court to evidence the petitioner PUD's knowledge of cattle grazing by the riparian landowners well below the 2041 elevation mark petitioners contended should be the ordinary high water line. J.A. 170a.

The district court found that prior

to construction and operation of the Box Canyon Dam in 1955, the line of ordinary high water was at 2028 feet above mean sea level, as measured at the Cusick gage. 926 F.2d at 1505, J.A. 26a, 157a, 170a. The dam caused these lands to be submerged up to elevation 2034. J.A. 172a. When the United States sued the PUD on behalf of the Kalispels, claiming a trespass, the petitioners took the position that those areas between the 2028 and 2041 elevations were always riverbed, since they were subject to a spring overflow up to elevation 2041.

Petitioners' definition of ordinary high water would place the line at elevation 2041, the median elevation of the spring high water. Joint Petition at 12. This definition would relieve the PUD of any obligation to the Kalispels for flooding up to that level. 926 F.2d at

1505, J.A. 27a. The courts below, relying on Austin v. City of Bellingham, determined that, under Washington law, the annual spring rise in the river must be excluded from the ordinary high water line calculation. Excluding the annual spring rise, they located the riverbed boundary based on "the highest level normally reached by the river each year." 926 F.2d at 1505, J.A. 28a.

Both the courts below decided that certification to the Washington Supreme Court was unnecessary and inappropriate. Citing Austin, the court of appeals held that the state supreme court had already ruled, and that its ruling was unambiguous. 926 F.2d at 1506 n.3, J.A. 31a-32a, n.3. It also decided it would be inappropriate to stay the federal court proceedings while petitioners sought to convince the state supreme court to change

the definition of ordinary high water, in a separate action they had filed in state court. Id.

As discussed below, petitioners have not demonstrated that the federal court construction of the applicable state rule is clearly wrong. Nor have they provided any sufficient reason as to why that construction should be reviewed.

SUMMARY OF ARGUMENT

Petitioners maintain that riparian lands used for agriculture or grazing should be considered part of the riverbed if they are overflowed part of each year. According to their definition of ordinary high water, the boundary of riparian lands should be set at the average of the highest water which occurs during the few months of spring runoff, rather than being

based on the levels normally occurring nine to ten months of the year. They cite no state or federal court decision taking that approach. Instead, after the federal district court ruled on the ordinary high water line issue, petitioners filed a separate lawsuit in state court to relitigate it as to a non-Indian riparian land owner of a former allotment within the Kalispel Indian Reservation. PUD No. 1 of Pend Oreille County and State of Washington v. Tombari Family Limited Partnership, et al., Pend Oreille Superior Court No. 85-2-00128-8 (filed November 4, 1985).

The state trial court held the petitioners barred by collateral estoppel, but now they rely on the hope that the Washington Supreme Court will adopt their ordinary high water definition. The federal courts construed the existing law

of the state supreme court on ordinary high water lines, based on the criteria set forth in Austin v. City of Bellingham. That case, like cases in other jurisdictions, clearly protects the riparian landowners' interest in lands subject to relatively short periods of flooding but still useful during most of the year for agricultural and/or grazing uses. Petitioners have not pointed to any contrary case law, or shown that the construction of existing law was unreasonable.

Nor does the petition raise an issue of special importance. To the contrary, the result petitioners seek would upset a long-standing rule of property ownership and, when applied to the facts of this case, would impede one of the federal government's purposes in setting aside an Indian reservation, i.e., to provide an

opportunity for Indians to support themselves not only by hunting and fishing but also by farming, grazing, and other less traditional pursuits.

REASONS FOR DENYING THE WRIT

A. No Showing Has Been Made That The Court Of Appeals' Construction Of State Law Was Unreasonable Or Clearly Wrong

No exceptional circumstances exist for this Court to depart from its practice of leaving the determination of questions of state law to the intermediate federal courts. See, Haring v. Prosise, 462 U.S. 306, 314 n. 8, 103 S.Ct. 2369, 2373 n.8, 76 L.Ed 2d 595 (1983) ("It is our practice to accept a reasonable construction of state law by the Court of Appeals.... standing alone, a challenge to state law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"). The Court has stated the exceptions in various

ways. See e.g., United States v. Durham Lumber Co., 363 U.S. 522, 526-527, S.Ct. 1282, 1284-1285, 4 L.Ed 2d 1371 (1960) (construction "clearly erroneous"); The Tungas v. Skovgaard, 358 U.S. 588, 596, 79 S.Ct. 503, 508, 3 L.Ed. 2d 524 (1959) ("clearly wrong"); Propper v. Clark, 337 U.S. 472, 486-487, 69 S.Ct. 1333, 1340-1341, 93 L.Ed. 1480 (1949) ("unreasonable"); Palmer v. Hoffman, 318 U.S. 109, 118, 63 S.Ct. 477, 482, 87 L.Ed. 645 (1943) ("plain error"). The principle reflects a belief that the district courts and courts of appeal are more familiar with and better able to interpret the laws of their respective states. Bishop v. Wood, 426 U.S. 341, 344-347, n.10, 96 S.Ct. 2074, 2078 n.10, 48 L.Ed 2d 684 (1976). Particularly where both the district and appellate courts have reached the same conclusion, an independent-

examination by the Supreme Court has been denied. Id.

In Bishop, the Court refused to reexamine the state law interpretation where the lower federal courts had reached the same conclusion, the interpretation was "tenable," and it had "some support" in a decision of the state supreme court. Id. at 347. The Court's long-standing preference for allowing the lower federal courts to resolve state law issues is reflected in the fact that the Supreme Court Rules no longer list conflicts between federal court interpretations and applicable state law as a ground for certiorari. Compare, Rule 19(a), (b) of the Revised Rules of 1970 and Rule 10.

Petitioners' grievance is not premised on what the current law of the Washington State Supreme Court is but on what they hope it will be if they prevail

in their appeal in the Tombari lawsuit. They argued below that the ordinary high water line should be set at the highest level reached by the stream each year, including the annual spring flood, averaged over a period of years. 926 F.2d at 1505, J.A. 27a-28a. Petitioners contended that a riverbed must encompass land useable for pasture or other agricultural pursuits if that land is subject to spring flooding. Both the court of appeals and district court rejected that argument as contrary to the Washington State Supreme Court's decision in Austin v. City of Bellingham. 926 F.2d at 1506, J.A. 30a-32a, 171a. Petitioners acknowledge that this state supreme court decision is the "only decision of the Supreme Court of the State of Washington which deals in any significant way with a description of the line of ordinary high

water on fresh water." Joint Petition at 34. However, they assert, without explanation, that the rationale of that case does not apply to these facts and the language relied upon is dicta. Id at 34,36. That is incorrect.

Austin dealt with a claim by a lakefront property owner that a city dam had raised the water level and thereby flooded part of his land, rendering it incapable of cultivation and improvement. 69 Wash. at 678. The Washington Supreme Court held that the property boundary was the line of ordinary high water and announced the rules to be followed in determining either a "high water mark" or "ordinary high water" line. It quoted with approval the following definition:

> High-water mark does not mean the height reached by unusual floods; for these usually soon disappear. Neither does it mean the line ordinarily reached by

> the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes; nor yet does it mean meadow land adjacent to the river, which when the water leaves it, is adapted to and can be used for grazing or pasturing purposes. The line, then, which fixes the high-water mark is that which separates what properly belongs to the river bed from that which belongs to the riparian owner - that is, the owner of adjoining land. Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow on it, may be regarded as a part of the bed of the river which overflows it.

Id. at 681 (quoting 4 Words and Phrases, p. 3290, which cited, Welch v. Browning, 115 Iowa 690, 87 N.W. 430, a case involving a boundary along the Mississippi River). The Washington Supreme Court then emphasized that the line of ordinary high water is not the highest water that may be proved. Id. Other case law the court relied upon also included situations

involving rivers. The court drew no distinction between lakes and streams as to applicability of the definition of ordinary high water, which it quoted. Id. at 679-680.

Petitioners claim, without citation to any specific evidence or authority, that the rulings here makes the boundary the line of ordinary low water. Joint Petition, at 33-34. However, in excluding the annual spring rise of the river, the lower federal courts followed precedent and gave meaning to the phrase, "ordinary high." See, United States v. Claridge, 416 F. 2d 933, 934 (9th Cir. 1969).

Petitioners have not cited one case, state or federal, holding that the ordinary high water line should be defined based only on annual spring highs and without regard to the agricultural and grazing usefulness of the affected lands.

The courts below properly applied Austin[1].

Even if the state supreme court had never addressed the meaning of ordinary high water line, a lower federal court may properly determine the state law criteria. This Court has deferred to such interpretations so long as they appear reasonable. Bishop 426 U.S. at 345-346, n. 10.

B. The Issue Is Not One Of Special Importance

Although petitioners claim that whether ordinary high water lies at elevation 2028 or 2041 is of tremendous public importance and interest, they do

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[1] The courts also reasonably exercised their discretion to deny petitioners' request for certification to the state supreme court or stay, pending a decision in Tombari. 926 F.2d at 1506 n.3, J.A. at 32a, n.3, [relying on City of Houston v. Hill, 482 U.S. 451, 470-71, 107 S.Ct. 2502, 2514, 96 L.Ed.2d 398 (1987); In re Elliott, 74 Wash. 2d 600, 446 P.2d 347, 358 (1968)].

not offer any specific explanation and example of how this particular ruling has such a profound impact. While petitioners make many general references to the equal footing doctrine and state sovereign interests in navigable rivers, the Court is not being asked to decide whether the State of Washington or the Kalispel Indian Tribe owns the bed of the Pend Oreille River where it flows along uplands of the Kalispel Indian Reservation. Both the district court and court of appeals ruled that the riverbed belongs to the State; and the Tribe is not filing a cross petition challenging that holding. Nor is there any dispute that the boundary of the State's riverbed ownership is at the line of ordinary high water, as announced in the Washington Constitution, Article XVII, Section 1. What the Court is being asked to review is a federal court determination

of the meaning of ordinary high water, under state law.

The specific dispute is whether the federal court should have set the ordinary high water line at the highest mean annual water elevation, reached in the annual spring rises, or whether it properly excluded from riverbed areas where cattle could be pastured or other agricultural pursuits engaged in for most of the year. Prior to construction of the Box Canyon Dam, the lands above elevation 2028 were submerged only during the spring rises. No evidence has been pointed to of state or general public dependence on the lands above elevation 2028. On the other hand, the Kalispels used this area as their property for grazing and hay production.

Petitioners argue that "any decision which affects the interests of a state in the navigable waters and soils under them

is a matter of great public interest and import to the people of the State." Joint Petition at 31. Innumerable cases affect such state interests in some respect. For example, a wide array of disputes can arise over the meaning of terms which control the applicability of state regulatory laws, such as Washington State laws governing hydraulic projects below the ordinary high water line, pursuant to RCW 75.20.100, and laws regulating projects in the "shorelines", pursuant to RCW 90.58. According to petitioners' position, anyone who challenges whether the site of his activity is within the ordinary high water line or shoreline raises an issue of such great importance that this Court should ultimately decide it.

Nor have petitioners shown any justification for the claim that a

"substantial likelihood" exists that there will be a conflict between the ruling below and the Washington State Supreme Court's disposition of the Tombari case. See, Joint Petition at 25. To the contrary, the trial court in that action refused to reach the merits on the basis of collateral estoppel, and the state supreme court could certainly affirm that decision.

Nor is there any need for this Court to decide whether federal or state law controls the determination of ordinary high water in this context. Petitioners wrongly claim that the court of appeals concluded federal law controls. Joint Petition at 37. To the contrary, the court of appeals expressly stated, "Federal and state law are the same on the definitional issue determinative of Phase 1 and we therefore need not resolve which

controls." 926 F.2d at 1505, J.A. 28a. Both the district court and court of appeals relied on state law, which petitioners claim must be determinative. The federal cases, cited by the court of appeals, served to underscore that Austin is consistent with ordinary high water definitions in other jurisdictions, as well as to show why it was unnecessary to decide which law controls.\[2]

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[2]/ Even if the state supreme court were to change the ordinary high water rules announced in Austin and petitioners were able to reopen the ordinary high water line issue in this case, the result could be the same. While Austin's compatibility with federal case law made it unnecessary to decide whether federal or state law controls, a new state supreme court definition of ordinary high water could require addressing that question. Respondent Kalispel Indian Tribe does not agree that state law necessarily controls, since the boundaries of Indian reservation land held in trust by the United States are involved, as well as unique federal interests in protecting the agricultural and grazing value of that land. See, California, ex rel. State Lands Com'n v. U.S., 457 U.S. 273, 278-284, 102 S.Ct.

As to the federal case law cited by the court of appeals, the petitioners again charge that the court misapplied it to the facts of this case; and, again, they fail to cite any case, federal or state, which relies on the ordinary high water line test they espouse.

The new definition of ordinary high water sought by the petitioners would create a conflict with federal law. In 1923, this Court excluded "extraordinary freshets of the winter or spring" from the measure of a riverbed. Oklahoma v. Texas, 260 U.S. 606, 631, 43 S.Ct. 221, 67 L.Ed 428 (1923). See also, Alabama v. Georgia, 64 U.S. (23 How.) 505, 515 16 L.Ed. 556 (1859). Quoting from Howard v. Ingersoll, 54 U.S. (23 How.) 380, 14 L.Ed 189 (1851),

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2432, 2435-2439, 73 L.Ed.2d 1 (1982); Felix S.Cohen's Handbook of Federal Indian Law, (1982 ed.), pp. 580-581 and n. 10.

the Third Circuit treated as above the ordinary high water line, lands "which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture." Borough of Ford City v. United States, 345 F.2d 645, 648 (3d Cir.), cert. denied, 382 U.S. 902 (1965). The Eighth Circuit has similarly defined the ordinary high water line as the line below which the soil is so usually covered that no vegetation grows and its value for agricultural purposes is destroyed. Harrison v. Fite, 148 F. 781 (8th Cir. 1906). Under petitioners' theory, any riparian landowners who have used land subject to annual flooding for agriculture or grazing would have been mistaken in assuming that it was part of their property. If the state or municipality chooses to inundate those lands

permanently, the landowner would not be entitled to any compensation. As this Court observed in Howard v. Ingersoll, the ordinary high water line definition arises from "the popular sense" of the terms "bank" and "river". 54 U.S. at 415. The definition conforms to natural expectations of where the riverbed ends and upland property begins.

CONCLUSION

To hold, as the federal courts did here, that an ordinary high water line may not be based on the highest flows which occur during a brief period of the year, and to exclude from riverbed those lands useable for agriculture or grazing, is not unreasonable or clearly wrong. The court of appeals' ruling is grounded in a long-standing, unambiguous, Washington State Supreme Court opinion. It is neither

unprecedented or patently contrary to the public interest.

Both state and federal cases dating back to the early part of this century have announced the same principles for setting an ordinary high water line. In arguing their high water concepts, petitioners fail to mention the public interest in honoring the property expectations of riparian landowners.

No adequate justification has been shown for certiorari and the writ should be denied.

DATED this 3rd day of October, 1991.

RESPECTFULLY SUBMITTED,

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